IN THE

Supreme Court of the United States

OCTOBER TERM, 1946.

No. 92.

WALTER P. GARDNER, Trustee of The Central Railroad Company of New Jersey,

A Debtor-Petitioner,

vs.

THE STATE OF NEW JERSEY,

A Creditor.

ON WRIT OF CERTIORARI TO THE UNITED STATES CIRCUIT COURT OF APPEALS FOR THE THIRD CIRCUIT.

BRIEF ON BEHALF OF THE CITY OF JERSEY CITY, NEW JERSEY, *AMICUS CURIAE.*

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INDEX

	PAGE
Interest of *Amicus Curiae*	1
Statement of the Case	3
(1) The Tax Claims of the State	3
(2) The Railroad Tax Settlement Acts and the New Jersey litigation as to constitutionality thereof	4
(3) Circumstances leading to entry of Order No. 271	11
(4) The pending appeal to the Third Circuit Court of Appeals from Order No. 260	14
Argument	17
I. The trustees' petition for an adjudication by the Bankruptcy Court as to the existence and binding effect of the "Settlement Acts" contract constitutes a suit against the State without its consent, which the Court is without jurisdiction to entertain	17
(1) The Settlement Acts "contract" is an entirely different transaction than the assessment of taxes and accrual of interest, and cannot found a permissible cross-claim against the State's claim	18
(2) The petition of the trustee seeks original relief of an affirmative nature and therefore cannot be interposed as a cross claim against the claim of the state	25
(3) No court possesses jurisdiction to entertain a claim of set-off against a tax obligation	30

PAGE

II. If the Bankruptcy Court has jurisdiction to entertain the cross claim of the State, the matter of the constitutionality of the Settlement Acts and their applicability to the trustee should be referred to the New Jersey courts for determination in the interests of "the appropriate relationship between Federal and State authorities functioning as a harmonious whole" 33

III. A reference of the questions of state law to the state courts would eliminate the necessity of deciding Federal Constitutional questions on the basis of "preliminary guesses regarding local law" 46

IV. The Uniform Declaratory Judgments Act is law in New Jersey and makes available a determination of the issues sought to be referred to the state courts 53

Conclusion 56

FEDERAL CONSTITUTION.

Article I, Sec. 8 ..... 4, 47
Fourteenth Amendment 4, 47

FEDERAL STATUTES.

Bankruptcy Act, Section 77 ..... 3, 41
Chapter X 19

NEW JERSEY CONSTITUTION.

Article I, par. 20 ..... 5, 9, 10, 35
Article VII, Sec. 2, par. 2 40

NEW JERSEY STATUTES.

	PAGE
P. L. 1941, ch. 391	5
Railroad Tax Settlement Acts:	
P. L. 1941, ch. 290	2, 4, 6, 7, 22, 26, 57
P. L. 1942, ch. 241	2, 6, 7, 22, 26, 47, 57
R. S. 1937, 54:24-11	1
R. S. 52:18-1, et. seq.	40
R. S. 2:26-66, et seq.	53

OTHER AUTHORITIES.

1. Am. Jur. 252, Sec. 65	28
1. Am. Jur. 224, Sec. 23	29
Borchard, Declaratory Judgments, (2d Ed. 1941) pages 155, 520, 875, 884, 885, 915, et seq.	56

CASES CITED.

Alabama State Federation of Labor v. *McAdory*, 325 U. S. 450	34
Aplin v. *Grand Traverse County*, 73 Mich. 182, 41 N. W. 223	18
Apperson v. *City of Memphis*, 2 Flipp. 363, Case No. 497, 1 Fed. Cas. 1068	31
Arkansas Corporation Commission v. *Thompson*, 313 U. S. 132	34, 44
Attorney General v. *Racecourse Betting Control Board*, 1 Ch. 34	55
Bates v. *Republic*, 2 Tex. 616	18
Battle v. *Thompson*, 54 N. C. 406	18
Bull v. *United States*, 295 U. S. 247	19
Burford v. *Sun Oil Co.*, 319 U. S. 315	34
Charlotte v. *Kean*, 207 N. Y. 346, 100 N. E. 1116	31

PAGE

Chicago v. *Fieldcrest Dairies*, 316 U. S. 168 34, 35, 37, 38, 39, 43, 46, 51
City of Camden v. *Allen*, 26 N. J. L. 398 31
Empire Trust Co. v. *Board of Commerce and Navigation*, 124 N. J. L. 406, 11 Atl. (2d) 752 54
Enterprise v. *Rowls*, 204 Ala. 528, 86 So. 374 31
Finnegan v. *Fernandina*, 15 Fla. 379 31
Ford Motor Co. v. *Department of Treasury of Indiana*, 323 U. S. 459 44
Gatling v. *Cateret County*, 92 N. C. 536 31
Great Lakes Dredge & Dock Co. v. *Huffman*, 319 U. S. 293 ..... 34, 45
Howard v. *Cook*, 83 P. (2d) 209 25
In re Central R. Co., of N. J., 136 Fed. (2d) 633 (C. C. A. 3rd, 1943) cert. den. 320 U. S. 805 ....8, 12, 34, 35
In re Monongahela Rye Liquors, Inc., 141 Fed. (2d) 864 (C. C. A. 3rd 1944) 18, 19
Jefferson County Fiscal Court v. *Jefferson County ex rel. Grauman, County Attorney*, 278 Ky. 785, 129 S. W. (2d) 554 55
Jefferson County Fiscal Court v. *Jefferson County ex rel. Grauman, County Attorney*, 278 Ky. 68, 128 S. W. (2d) 230 55
Jersey City v. *Zink*, 133 N. J. L. 437, 44 Atl. (2d) 825 1
Jones, Attorney General v. *Vermont Asbestos Co.*, 108 Vt. 79, 182 Atl. 291 55
Lynn v. *Kearney County*, 121 Neb. 122, 236 N. W. 192 55
Matthews v. *Rodgers*, 284 U. S. 525 ..... 34, 45
Meredith v. *Winter Haven*, 320 U. S. 228 .....34, 45, 46
Milo v. *Milo Water Co.*, 131 Me. 372, 163 Atl. 163.... 31
Moore v. *Tate*, 87 Tenn. 725, 11 S. W. 935 18

PAGE

People v. *Conner*, 59 Hun. 299, aff'd 128 N. Y. 640, 29 N. E. 147 19
Port Royal & A. Railway C. v. *South Carolina*, 60 Fed. 552 (C. C. S. C. 1894) 25
Public Utility Commission of Ohio v. *United Fuel Gas Co.*, 317 U. S. 456 45

Railroad Commission of Texas v. *Pullman Co.*, 312 U. S. 496 ..... 34, 39, 46, 51, 52
Raymond v. *State*, 54 Miss. 562 18
Reeside v. *Walker*, 11 How. (U. S.) 272 19
Re Patterson-MacDonald Ship Building Co., 293 Fed. 192 (C. C. A. 9th, 1923) 18

Somerset v. *Somerset Banking Co.*, 109 Ky. 549, 60 S. W. 5 31
Spector Motor Service v. *McLaughlin*, 323 U. S. 101 ..... 34, 46, 48, 49, 53
State v. *B. & O. R. Co.*, 34 Md. 344, aff'd 21 Wall. (U. S.) 456 18
State v. *Erie Railroad Company*, 23 N. J. Misc. 203, 42 Atl. (2d) 759 ..... 30, 48
State, ex rel. Eubanks v. *Board of Commissioners, et al.*, 150 Kans. 143, 91 Pac. (2d) 2 55
State ex. rel. Hopkins v. *Grove*, 109 Kans. 619, 201 Pac. 82 55
State v. *Holgate*, 107 Minn. 71, 119 N. W. 792 19
Stone v. *Todd*, 49 N. J. L. 274, 8 Atl. 300 28
Stratton v. *St. Louis S. W. R. Co.*, 284 U. S. 521 45

Turner v. *Dolton*, 134 Ga. 462, 67 S. E. 929 31
Thompson v. *Magnolia Petroleum Co.*, 309 U. S. 478 ..... 34, 41, 42, 46

United States v. *Eckford*, 6 Wall. (U. S.) 484 19

PAGE

Ward v. *Klamath County*, 108 Ore. 574, 218 Pac. 927 55
Watson v. *Buck*, 313 U. S. 387 34
White v. *Governor*, 18 Ala. 767 19
Wilentz v. *Hendrickson*, 133 N. J. Eq. 447, 33 Atl. (2d) 366 .....9, 10, 11
Wilentz v. *Hendrickson*, 135 N. J. Eq. 244, 38 Atl. (2d) 199, affirming 133 N. J. Eq. 447, 33 Atl. (2d) 366 .....6, 7, 10, 11, 34, 47, 48, 54, 55, 56

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A Creditor.

BRIEF ON BEHALF OF THE CITY OF JERSEY CITY, NEW JERSEY, *AMICUS CURIAE.*

(Italics supplied, except as otherwise stated.)

Interest of *Amicus Curiae.*

The City of Jersey City files this brief *amicus curiae* pursuant to Rule 27, par. 9, as a political subdivision of the State of New Jersey. The interest of the city in the subject matter of this controversy arises from the fact that it is statutory distributee of approximately thirty per cent of the taxes assessed by the State of New Jersey against The Central Railroad Company of New Jersey, R. S. 1937, 54:24-11, and of accrued interest thereon. *Jersey City* v. *Zink*, 133 N. J. L. 437, 44 Atl. (2d) 825. It is thus apparent that any defeat or impairment of the State's tax and inter-

est claim against the railroad seriously affects the pecuniary interests of the City of Jersey City. The City of Jersey City respectfully submits that the judgment of the Third Circuit Court of Appeals reversing the order of the district court was correct in result and should be affirmed, but proposes to confine this brief to argument in support of the following narrow propositions:

1. The bankruptcy court was without jurisdiction to entertain the attempt of the trustee and his late co-trustee to enforce compliance by the State of New Jersey with the contract allegedly made by the state and the trustees of the debtor in the form of the Railroad Tax Settlement Acts (P. L. 1941, Ch. 290, and P. L. 1942, Ch. 241), since the subject matter of that alleged contract was extrinsic to and did not arise out of the same transaction as the State's tax and interest claims, so that the enforcement of the contract against the State would constitute a suit against the State by a citizen thereof without its consent.

2. Should this Court determine that the bankruptcy court possesses jurisdiction to determine the existence of the said alleged contract and to enforce compliance therewith by the State, the bankruptcy court should, nevertheless, be directed, in the exercise of appropriate discretion under the circumstances presented, to refer to the New Jersey courts for adjudication the issues arising with respect to the constitutionality and effectiveness, as to the trustee, of the Railroad Tax Settlement Acts.

Statement of the Case.

(1)

The Tax Claims of the State.

On October 30, 1939, the United States District Court for the District of New Jersey approved the debtor's petition filed under Section 77 of the Bankruptcy Law (R. 1). On January 8, 1940, Shelton Pitney and Walter P. Gardner qualified as trustees. The latter survives as sole trustee.

Thereafter, the Comptroller of the State of New Jersey filed "proofs of claim" for balances of property taxes assessed for the years 1932 to 1939, inclusive, together with statutory interest (R. 34). The amount computed by the state in the reply of the state to "Supplemental and Amended Objections and Defenses of Debtor's Trustees," etc. to be due from the debtor for said tax years, as of September 1, 1941, is $14,140,887.53 for taxes, and $12,626,173.50 for interest (R. 94), together with minor sums due from debtor's subsidiaries (R. 103, 104, 106, 107). The tax delinquencies arose as a result of the withholding by the debtor of from 40% to 50% of the annual levies concurrently with litigation against the amount and legality of the taxes assessed conducted by the debtor and other major railroad companies in New Jersey, in both the state and federal courts, all of which litigation was determined adversely to the railroads and culminated with the denial of certiorari by the United States Supreme Court in the 1934, 1935 and 1936 cases on April 28, 1941 (318 U. S. 568). See the full description of the litigation in the Reply of the State to the "Supplemental and Amended Objections and Defenses

of Debtor's Trustees to Claims filed by the State of New Jersey" (R. 97-102).

Objections were filed by the trustees to the proofs of claim originally filed by the State Comptroller, reciting various objections to the taxes under the New Jersey statutes and Constitution (R. 72, 73, 74), and, in addition, specific objections to the assessments on grounds of violation of the equal protection and the due process clauses of the 14th Amendment to the Federal Constitution (R. 73, 74), and of the Interstate Commerce and Bankruptcy clauses thereof (Article I, Sec. 8) (R. 74, 75). Reply to the objections was filed by the Attorney General.

The issues raised on the "proofs of claim" were referred to a Special Master on April 1, 1941 (R. 48, par. 11), but the order of reference was revoked by Order No. 163 prior to the holding of any hearings.

(2)

The Railroad Tax Settlement Acts and the New Jersey litigation as to constitutionality thereof.

On July 22, 1941, the legislature of New Jersey adopted Chapter 290 of the Laws of 1941, which purported to waive and remit the liability for interest which had accrued on delinquent railroad taxes for the years 1932 to 1940, inclusive, owing by debtor and the other major railroad systems operating in New Jersey (other than the Pennsylvania Railroad Company, which, though joining in the legal attacks upon the assessments, always paid the taxes in full on time), and to postpone the time for payment of principal taxes over periods of years varying from 2 to 20 years.

In the case of the debtor the period was 20 years. The statute required that the railroads file with the State Treasurer waivers of any right further to contest the assessments for the years 1932 to 1940, inclusive, and also for the then current year of 1941.

Chapter 290 further provided that the statutory agreements to pay the principal sums and the waivers and discontinuances of appeals should be approved by the Attorney General before acceptance by the State Treasurer. Being of the opinion that the statute violated a prohibition against donations to private corporations contained in Article I, par. 20 of the Constitution of New Jersey, the Attorney General declined to consider the sufficiency of the documents and, on September 4, 1941, filed a civil information in the Court of Chancery of New Jersey seeking to enjoin the State Treasurer from acting under the statute (R. 50, par. 16).

On August 8, 1941, the bankruptcy court ordered the trustees to make the required tender's under Chapter 290. The consequent tenders by the trustees were declined by the State Treasurer because the Attorney General had not approved them.

On December 23, 1941, the legislature of New Jersey adopted Chapter 391 of the Laws of 1941, authorizing and directing the State Treasurer to defend the information proceedings brought by the Attorney General and appropriating funds for the hiring of counsel to defend the constitutionality of the act. Pursuant thereto the State Treasurer engaged as counsel Josiah Stryker, senior member of the firm of Lindabury, Depue & Faulks (now Stryker, Tams & Horner), of Newark, New Jersey, Herbert J. Hannoch, of

that city, J. H. Thayer Martin, Newark lawyer who had been State Tax Commissioner of New Jersey from 1931 to 1941, and had made all of the railroad tax assessments in question, and T. Millet Hand, of Cape May, now a member of Congress from New Jersey. These distinguished members of the New Jersey Bar conducted the defense of the constitutionality of said Chapter 290 and of the later and interrelated Chapter 241 of the Laws of 1942, before the Court of Chancery and the Court of Errors and Appeals of New Jersey.

Though the Central of New Jersey trustees and the other railroad companies were immediately apprised of the institution of the Chancery litigation by the refusal of the State Treasurer to accept the tenders of documents and checks made by them under the act, they never applied to be admitted as parties, being obviously content with the defense of their interests in the Chancery suit by the capable counsel acting in that behalf as counsel for the State Treasurer. The Attorney General, of course, could not have made the trustees parties to the information proceedings in view of the restraint entered below against the institution of any suit against the debtor or the trustees at the inception of the bankruptcy.

After issue was joined in the information proceedings, the legislature, on May 21, 1942, adopted Chapter 241 of the Laws of 1942, which purported to amend Chapter 290 in certain respects later found by the New Jersey courts to have been devised for the purpose of buttressing the tax settlement plan against the constitutional objections made by the Attorney General. *Wilentz* v. *Hendrickson*, 135 N. J. Eq. 244, 248, 38 Atl. (2d) 199 (E. & A., 1944), affirming

133 N. J. E. 447 (Ch. 1944); 33 Atl. 2d. 366. The two statutes are hereinafter referred to as the Settlement Acts.

Among other things, Chapter 241 eliminated the requirement that the Attorney General approve the settlement documents. It was further provided that any railroad which desired to comply, should enter into the required agreement to pay the full amount of taxes assessed for the years 1932 to 1940, and make the first installment payment on or before June 15, 1942.

Section 7 of Chapter 241 provided that upon a default by any railroad taxpayer in the making of any installment payment due under the statutory plan, the full amount of taxes and statutory interest penalties previously due from the taxpayer should again become due and payable. The 20-year period for the making of installment payments applicable to the debtor under Chapter 290 was unchanged by Chapter 241. In the case of the debtor, therefore, the statute contemplated an arrangement which might be executory for twenty years.

On the day of the adoption of Chapter 241, the Attorney General, being of the opinion that the basic constitutional infirmities persisted, filed a Supplemental Information, and on the same day the Court of Chancery on his application temporarily restrained the State Treasurer from carrying out or executing any of the provisions of the act. See *Wilentz* v. *Hendrickson, supra* (135 N. J. Eq. at p. 248). The restraining order was continued from time to time and was made permanent by final decree of the Court of Chancery on September 28, 1943 (R. 77). Pursuant to the restraint the State Treasurer has at all times refused to accept any documents or payments from any railroad com-

pany, including the trustees, and such tenders were "consequently * * * without legal effect." See *In re Central R. Co. of N. J.*, 136 F. (2d) 633, 638 (C. C. A. 3rd, 1943); cert. den. 320 U. S. 805.

Subsequent to the adoption of Chapter 241 of the Laws of 1942, and while the civil information was pending undetermined in the Court of Chancery, the trustees herein petitioned the bankruptcy court for an order adjudicating the tax claims of the State of New Jersey in the amounts and on the terms fixed by the Settlement Acts, representing to the court that they were entitled to such adjudication forthwith by way of compensation for certain disadvantages and burdens allegedly imposed upon them by said acts. Over objection by the Attorney General the court made its Order No. 163* agreeably to the request of the trustees, adjudicating the tax claim of the state for the years 1932-1940 at the amount of the principal taxes as computed by the trustees and disallowing the interest charges.

On appeal by the State of New Jersey to the Third Circuit Court of Appeals, Order No. 163 was reversed. *In re Central R. Co. of N. J., supra,* the Court stating that the district court had by its orders necessarily adjudicated the constitutionality of the Settlement Acts without affording the state a hearing on the question, and that (136 Fed. (2d) at p. 638)

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* Order No. 163 and the petition therefor are not printed in the record herein. It was stipulated by the parties below, however, "that any party may refer to or quote *in extenso* any of the orders, minutes, exhibits or other portions of the record in the bankruptcy court, in his brief or at the oral argument of No. 8861 and No. 8889, or either of them, or in the course of any review of the judgment or judgments entered therein." (R. 147).

> "It would, therefore, have been appropriate, in the exercise of a wise discretion, for the district court to have stayed its hand until the state court had determined whether the tax settlement acts were valid or a nullity."

Subsequently, on July 20, 1943, after full proofs were made by both sides and the question as to the constitutionality of the acts was argued in full, the Court of Chancery disposed of an application by the State Treasurer to dismiss the restraints theretofore entered on the ground that the acts were constitutional, by denying such application and filing an exhaustive opinion concluding that the acts were in violation of Article 1, par. 20, of the New Jersey Constitution. *Wilentz* v. *Hendrickson*, 133 N. J. Eq. 447, 33 Atl. (2d) 366 (Ch. 1943). In its opinion the Court noted that:

> "The constitutional questions involved have been elaborately debated by counsel with much industry, learning and ability. Voluminous affidavits have been submitted and examined. The numerous decisions cited in the briefs have been studiously explored." (133 N. J. Eq. at p. 454.)

Thereafter, on September 28, 1943, after final hearing, the court made its final decree adjudging the statutes null and void as in contravention of Article I, par. 20, of the New Jersey Constitution, and permanently restraining and enjoining the State Treasurer from carrying out or executing the provisions of the acts and from accepting any payments or papers pursuant thereto (R. 77).

Upon appeal by the State Treasurer to the Court of Errors and Appeals, the decree was affirmed, the court

filing an opinion agreeing with the conclusion of the Court of Chancery that the Settlement Acts were in violation of Article 1, par. 20, and affirming the decree below for the reasons stated *both* in the opinion of the Court of Errors and Appeals *and in the opinion of the Court of Chancery. Wilentz* v. *Hendrickson, supra* (135 N. J. Eq. 244, 261).

It may be noted that the opinions of both the Court of Errors and Appeals and the Court of Chancery concluding that the Settlement Acts violated Article I, par. 20, of the State Constitution, were based almost entirely upon the determination of questions of *law* and *not*, as petitioner maintains, solely of fact. Without discussing the matter here at length, a reading of the reported opinions which, as seen above, represent, in combination, the considered view of the Court of Errors and Appeals, will demonstrate that the gravamen of unconstitutionality was found to consist of the *donative intent* of the New Jersey legislature in passing the acts in question. That intent was found to be manifest from the preamble of Chapter 290, the detailed statement in Chapter 241 of the purposes and objects of the act, the "considerations" upon the basis of which the legislature stated in Section 15 of the act, as amended, that it was making the remissions of interest in question, and the general background preceding and attending the adoption of the acts, which was a matter of common public knowledge in New Jersey. (See 133 N. J. Eq. at pp. 476, 480, 484, 487, and 135 N. J. Eq. at pp. 247, 248, 249, 253).

The analyses by both New Jersey courts of the "considerations" which were asserted by the State Treasurer to support and validate the remissions of interest were undertaken primarily from the standpoint of determining

whether they were of such a nature as to indicate that the legislature acted out of a donative intent, as forbidden by the Constitution, or out of a purpose to contract with the railroad companies, as contended by the State Treasurer. See 133 N. J. Eq. at pp. 476, 483. The court held, moreover, that the unquestionably *illegal* consideration for the remissions, consisting of the plain legislative intent to use public moneys in fostering and promoting public transportation by privately operated railroad companies, vitiated, as a matter of law, any otherwise valid considerations as might arguably exist, such as the undertaking of the railroads to discontinue pending tax litigation, 133 N. J. Eq. at p. 484.

Even the analysis of the question as to whether the surrender of the tax litigation constituted a "consideration" must be regarded as essentially a determination of law, rather than of fact, since any judgment with respect to whether the pending tax appeals were substantial rather than merely of nuisance value had to depend upon a consideration of the legal effect of previous judicial determinations of tax litigation. Again, the question presented was clearly one of law, rather than of fact. See 133 N. J. Eq. at p. 483; 135 N. J. Eq. at pp. 258, 259, 260.

(3)

Circumstances leading to entry of Order No. 271.

Instead of abiding by the decision of the New Jersey courts in *Wilentz* v. *Hendrickson, supra*, as the Third Circuit Court of Appeals clearly implied should have been done in its opinion reversing Orders No. 163 and No. 171,

In re Central R. Co. of N. J., supra (136 F. (2d) at pp. 638, 640; *cert. den.* 320 U. S. 805), the trustees filed their petition in the District Court below on August 12, 1944 (R. 43), reciting the history of the tax claim to that date, including the adoption of the Settlement Acts and the tenders by the trustees in asserted compliance therewith; that such compliance had resulted in the consummation of a valid and binding contract (R. 60, par. 29); that the decision of *Wilentz* v. *Hendrickson* turned upon questions of fact only, not binding upon the trustees since they were not made parties to said proceedings (R. 54, par. 23); that there existed many considerations flowing to the state, so far as the debtor and trustees were concerned, which rendered the Settlement Acts constitutional as to them, if not as to other railroad companies (R. 56, par. 26); that if the decision in *Wilentz* v. *Hendrickson* deprived the trustees of the benefit of their contract, it constituted an illegal (presumably unconstitutional) impairment of their contract which was valid when made (R. 60, par. 29); that if the court determined that neither the trustees nor the state were bound by the said contract, the bankruptcy court would be required to pass upon the trustees' objections to the proofs of claim and upon the relative rights and priorities of the state and other lienholders (R. 62, par. 30); and that in view of all of the foregoing the trustees prayed that the court adjudicate (R. 62, 63):

> "(1) whether petitioners entered into a contract with the State of New Jersey, (2) whether such contract is binding on the parties thereto, (3) whether, if not binding on the State, petitioners are nonetheless bound by the prejudicial actions taken by them, (4)

if not binding on the parties thereto including petitioners, to what extent, if at all, the proofs of claim of the State of New Jersey should be allowed, (5) what order should in such event be made to restore the equivalent of the *status quo ante* as nearly as may be and (6) what in such event are the relative rights, claims, liens and priorities of the claimants in the assets of the Debtor's Estate; and that this Honorable Court may instruct petitioners whether to make on or before December 1, 1944 the additional payment on account of the taxes claimed and the additional interest payment required by Chapter 290 of the Laws of 1941, as amended by Chapter 241 of the Laws of 1942."

The petition was subsequently supplemented by the "Supplemental and Amended Objections and Defenses of Debtor's Trustees to Claims Filed by the State of New Jersey" (R. 83), which, in substance, restated the position taken in the August 12, 1944, petition, specifically set forth the Settlement Acts as defenses to the state's interest claims (R. 83, par. 1), and further claimed "alternatively" (R. 84, par. 5), that if the contention of the state that the Settlement Acts were without force or effect as applied to the trustees and to the debtor's estate should be sustained, then the tax claims should be reduced on the basis of the original objections of the trustees to the proofs of claim, same being incorporated in the "Supplemental Objections, etc." by reference, and for other reasons specifically recited and founded upon the 14th Amendment to the United States Constitution (R. 84, 85, 86). It was further therein contended, alternatively, that the claims of the state for interest should be reduced or disallowed on various grounds (R. 86, par. 9).

The state filed a special appearance objecting to the entertainment of the trustees' petition of August 12, on various jurisdictional grounds, including the attempt therein to obtain specific performance against the state of an alleged contract without the state's consent (R. 78).

On October 16, 1944, by its Order No. 250, the court referred the tax claims of the state, including the questions raised by the trustees with respect to the alleged contract arising out of the Settlement Acts, and also the jurisdictional questions raised by the state, to a Special Master for hearing and report (R. 80). The Special Master filed an interim report concluding that the bankruptcy court had possessed jurisdiction to determine the tax claims of the state and "that the claim of the state to sovereign immunity should be denied" (R. 116). Upon objections of the State of New Jersey to the interim report (R. 129), the district court entered Order No. 271 overruling the objections of the state and confirming the interim report of the Master (R. 138).

The judgment of the Third Circuit Court of Appeals under review in the present case reversed Order No. 271. (R. 168).

(4)

The pending appeal to the Third Circuit Court of Appeals from Order No. 260.

Notwithstanding the fact that the state had appealed from Order No. 250 below, because of the refusal of the bankruptcy court to determine the jurisdictional question raised by the state, the trustees and the Special Master

were preparing to go forward with the taking of testimony on all issues, meritorious, as well as jurisdictional. The state was therefore confronted with the prospect that the bankruptcy court was proposing to embark on a judicial inquiry which the Attorney General conceived should be referred to the state courts, if the bankruptcy court had jurisdiction at all. Accordingly, on December 11, 1944, the Attorney General filed and served a notice of motion and petition, requesting leave of the court to join the trustees as parties defendant in a suit to be instituted in the courts of New Jersey for a declaratory judgment "as to whether the debtor and its trustees entered into a contract with the State of New Jersey pursuant to the provisions of the Settlement Acts and whether such contract is binding on the parties thereto", and further praying for a modification of Order No. 250 so that pending the final determination of the state court proceedings the special master be directed not to proceed with the hearing of any matters of law or fact involving the constitutionality or applicability of the Settlement Acts to the debtor and the trustees. After hearing, the court entered Order No. 260, denying the application for the sole stated reason that:

> "* * * to grant the relief prayed for in said petition would result in further and prejudicial delay in the hearing and adjudication of the State's claim and in the reorganization of the Debtor and would not be in the public interest or in accordance with the intent of Congress in enacting Section 77 of the Bankruptcy Act." *

* Reference is made to the contents of Order No. 260 pursuant to the stipulation below, hereinabove referred to, under which any of the parties reserved the right to refer to and quote from any part of the bankruptcy record below (R. 147).

The state has appealed to the United States Third Circuit Court of Appeals from Order No. 260 and the cause has been listed on the docket of that court as No. 8808. A brief has been filed by the state therein, but an understanding was arrived at between the Attorney General and the trustees that the said appeal would not be proceeded with until the final determination of the jurisdictional question involved on the appeal from Order No. 271.

If this Court concludes that the bankruptcy court had jurisdiction, but that we are, nevertheless, sound in contending that, in the alternative, all issues with respect to the constitutionality and applicability of the Settlement Acts to the trustee should be referred to the New Jersey courts for determination, the pending said appeal of the state to the Third Circuit Court of Appeals from Order No. 260 will be superseded.

The City of Jersey City, as *amicus curiae*, presses the point that the said issues should be remanded to the New Jersey courts because both the dictates of sound public policy and the pecuniary interests of the city require that the entirety of this tax controversy be finally disposed of at as early a date as possible. It is now over two years since the New Jersey Court of Errors and Appeals adjudged the Settlement Acts unconstitutional. Both the state and its participating municipalities, including the City of Jersey City, have now been waiting for periods of time up to fourteen years, for a liquidation by the debtor of its tax and interest obligations. If this Court concludes that the bankruptcy court possesses jurisdiction in the premises, but that the sound exercise of discretion calls for the submission of the issues with respect to the constitu-

tionality and applicability to the trustee of the Settlement Acts to the courts of New Jersey for final determination, a great service could be rendered to all parties in interest if the Court were to make such a direction at this point, rather than simply reverse the judgment below and permit the additional delay of many months which would be required to argue the questions raised on the appeal from Order No. 260 before the Third Circuit Court of Appeals, and to further litigate the same questions before this Court on appeal or certiorari of any determination by the Circuit Court of Appeals.

ARGUMENT.

I.

The trustees' petition for an adjudication by the Bankruptcy Court as to the existence and binding effect of the "Settlement Acts" contract constitutes a suit against the State without its consent, which the Court is without jurisdiction to entertain.

The briefs of the parties to this appeal have discussed at length the question as to whether the attempt by the trustees to secure an adjudication by the bankruptcy court effective against the state, that there is in existence a binding and effective contract between the trustees and the State of New Jersey, under which the debtor is liable to the state for only so much money as is called for by the Settlement Acts, constitutes a suit against the state without its consent. As above stated, we agree with the position of the Attorney General that it is, and that the bank-

ruptcy court is therefore without power to make the adjudication. The purpose of the argument made under this Point of the present brief, however, is to demonstrate that, assuming the soundness of the contention of the trustee to the effect that the proofs of claim filed by the state in the bankruptcy court are tantamount to the institution of an action by the state against the debtor, thus opening the door to the introduction of proper defenses against such claims, the assertion by the trustee of non-liability on the basis of the supposed binding effect of the Settlement Acts contract is not within the rule stated, and the entertainment by the bankruptcy court of that question constitutes an allowance of a suit against the state without its consent.

(1)

The Settlement Acts "contract" is an entirely different transaction than the assessment of taxes and accrual of interest, and cannot found a permissible cross-claim against the State's claim.

It is very well settled that in order for a cross claim to be maintainable against an action by a state, and to be free from interdiction as a suit against the state without its consent, the subject matter of the cross claim must arise out of the same transaction as the claim of the state. *In re Monongahela Rye Liquors, Inc.*, 141 F. (2d) 864 (C. C. A. 3rd, 1944); *Re Patterson-MacDonald Ship Building Co.*, 293 F. 192 (C. C. A. 9th, 1923); *Aplin* v. *Grand Traverse County*, 73 Mich. 182, 41 N. W. 223; *Bates* v. *Republic*, 2 Tex. 616; *State* v. *B. & O. R. Co.*, 34 Md. 344, aff'd 21 Wall. 456; *Raymond* v. *State*, 54 Miss. 562; *Battle* v. *Thompson*, 54 N. C. 406; *Moore* v. *Tate*, 87 Tenn. 725, 11 S. W. 935;

White v. *Governor*, 18 Ala. 767; *People* v. *Conner*, 59 Hun. 299, aff'd 128 N. Y. 640, 29 N. E. 147; *State* v. *Holgate*, 107 Minn. 71, 119 N. W. 792, 793; and see *Bull* v. *United States*, 295 U. S. 247, 262; *United States* v. *Eckford*, 6 Wall. (U. S.) 484; *Reeside* v. *Walker*, 11 How. (U. S.) 272, 290.

An explicit application of the rule stated is found in *In re Monongahela Rye Liquors, Inc.* In that case, which was a petition for reorganization of a corporation under Chapter X of the Bankruptcy Act, the State of Pennsylvania had filed proofs of claim with the referee in specified amounts for unpaid capital stock, corporate loan and income taxes. The trustee filed objections to the tax claims and sought set-off or recoupment on account of claims for liquor sold by the bankrupt to the State Liquor Control Board and argued that the amount of the taxes due could not be determined until the trustee's counterclaims were passed upon, since the tax claims were based on estimates of the Pennsylvania Department of Revenue, upon failure of the corporation to file proper returns. The Commonwealth of Pennsylvania moved to dismiss the objections on the ground that the bankruptcy court had no jurisdiction to pass upon tax claims and that, in any event, there was no right in the trustee to maintain the cross claim against the Commonwealth. The appellate court held that the cross claims were not allowable. In so holding, the court stated (141 F. (2d) 864, at p. 869)

> "While Sec. 68, Sub. a of the Bankruptcy Act, 11 U. S. C. A. Sec. 108, Sub. a, provides that 'In all cases of mutual debts or mutual credits between the estate of a bankrupt and a creditor the account shall be stated and one debt shall be set off against the other, and the balance only shall be allowed or paid,'

it has been held that this section is to be interpreted in the light of the established doctrines of set-off at common law and in equity. Cf. *Cumberland Glass Mfg. Co.* v. *DeWitt and Company*, 237 U. S. 447, 454, 455; *In re Rosenbaum Grain Corporation*, 7 Cir. 103 F. 2d, 656, 658 * * *.

"A distinguishing feature of set-off is that it arises out of a transaction extrinsic to that out of which the primary claim arose. Cf. *Hastorf* v. *Degnan-McLean Contracting Co.*, D. C. N. Y., 128 F. 982, 983. In short a set-off rests upon a claim or demand based upon an independent cause of action. The independent nature of set-off is plainly recognized by the Federal Rules of Civil Procedure. * * * The present importance of the distinction between a counterclaim and a set-off lies in the fact that, under both federal and local law, in a suit by a sovereign a plea of set-off, being based as it is upon matter unrelated to the primary claim, is the equivalent of an independent suit against the sovereign which, of course, may not be sued without its consent. See *Nassau Smelting & Refining Works, Ltd.* v. *United States*, 266 U. S. 101, 106; *Commonwealth* v. *Matlack*, 4 Dall. Pa. 303, 1 L. Ed. 843.

* * *

"It is, of course, true that when the United States or a State institutes a suit, it thereby submits itself to the jurisdiction of the court, but, as to claims against the sovereign, the latter's submission to a court's jurisdiction, because of its suit, draws in only such adverse claims as have arisen out of the same transaction which gave rise to the Sovereign's suit. Cf. *Bull* v. *United States*, 295 U. S. 247, 261, 262; *United States* v. *Dugan Bros. Inc.*, 36 F. Supp. 109, 110; *State* v. *Holgate*, 107 Minn. 71, 119 N. W. 792, 793. A defendant's right in such regard is one of recoupment, and in *Bull* v. *United States*, *supra*, it is

> said that 'recoupment is in the nature of a defense arising out of some feature of the transaction upon which the plaintiff's action is grounded.' The rule of recoupment in bankruptcy derives from the rule that the trustee takes the bankrupt's property subject to the equities therein. It does not attach by reason of the set-off provision of Sec. 68, Sub. a, 4 Remington on Bankruptcy, 5th Ed. Sec. 1435."

From the careful statement of the applicable rule by the Third Circuit Court of Appeals in the foregoing case, and from the other decisions cited above, it clearly appears that in the instant case the bankruptcy c ırt can claim jurisdiction over the state by virtue of the filing of the state's tax claim, if at all, only in respect of such matters as arise out of the same transaction as that upon which the state's tax and interest claims are based. Careful examination of the nature of the trustee's cross claim against the state in the instant case, as framed in its petition to the court of August 12, 1944 (R. 43), clearly discloses that the cross claim is one for specific performance of an alleged executory contract between the trustee and the state arising out of a transaction distinctly *extrinsic* to that upon which the state's tax claims are based.

We will demonstrate under the next subpoint that the executory nature of the contract and the non-existence to date of any completed accord prevents the existence of any state of affairs which could be considered a *defense* to the state's tax claims. We will there further show that where the cross claim against the state is of that character, there is presented an independently sufficient basis for the declination by the court of jurisdiction against the state on such a claim. We confine our attention under the pres-

ent subpoint to a showing of the complete independence of the two transactions which underlie, respectively, the claim of the state and the cross claim of the trustees.

The "transaction" which founds the claim of the state is constituted by the assessment of taxes for each of the years in question which are in arrears, and the nonpayment of such taxes when due, giving birth to the continuous accrual of the statutory interest charges. The basic proofs of claim of the state were filed in 1940 (R. 64). The "transaction" which gives rise to the cross claim for specific performance against the state, on the other hand, is founded upon two acts of the New Jersey legislature, adopted in 1941 and 1942, respectively, argued by the trustee to constitute a binding contractual offer by the state, and upon the asserted acceptance thereof by the trustees, resulting, it is claimed, in a binding and enforcible contract. Under the contract, if the trustees would agree to waive and discontinue certain litigation then pending respecting the legality and amount of taxes theretofore assessed against the railroad, and would agree to make payment of the principal taxes assessed in installments over a period of twenty years, together with 3% interest on unpaid balances from December 1, 1940, the state's claim for interest on accrued taxes would be abated and cancelled. P. L. 1941, Ch. 290; P. L. 1942, Ch. 241.

Under the alleged contract, moreover, should any of the annual installments of taxes due under the agreement not be paid when due, then the remaining unpaid balance of taxes, together with all of the original interest charges, were immediately to become due and payable. P. L. 1942, Ch. 241, Sec. Since, moreover, The Central Railroad

Company of New Jersey was given twenty years within which to pay its principal taxes (R. 50, par. 14), under the formula set up in Section 2 of P. L. 1941, Ch. 290, the situation contemplated by the Settlement Act was one wherein a final and conclusive determination as to the amount of money owing from the railroad to the state could not be made until the expiration of twenty years after the passage of the act.

We submit that the foregoing recital demonstrates that the so-called Settlement Act contract is an entirely separate and distinct transaction from the original tax assessment transaction, in the sense in which the difference in the transactions is material under the rule stated in the above cited cases. The rationale of the rule seems to be that the filing of a claim or suit by a state constitutes a consent to the adjudication by the court of any matter of recoupment presentable by the defendant against the state. Certainly, there was no intention, actual or constructive, on the part of the State Comptroller who filed the proofs of claim on behalf of the state with the trustees in 1939, to consent, on behalf of the state, to the entertainment of jurisdiction by any court thereafter in an action for specific performance of a contract which might later be made between the state and the trustee, and which, in this case, was not made until the years 1941 and 1942.

Assuming there is jurisdiction in the bankruptcy reorganization court to entertain questions with respect to the amount or legality of taxes claimed by the state against the debtor and the trustee, the trustee's attempt to submit to the court for determination the question as to the constitutionality, under the New Jersey Constitution of the Set-

tlement Acts, and as to the binding effect of the alleged contract said to have arisen upon the basis of the enactment of those acts, does not raise a question pertaining to the amount or legality of taxes.

The original transaction upon which the state's claim is based is a tax assessment transaction. The later transaction upon which the trustee bases his cross claim is a contract transaction (or, more properly speaking, a gift upon condition) which not only includes as part of its subject matter the then accrued taxes and interest, but also includes divers other subject matters, such as discontinuances of pending tax litigations, waivers of objection to assessment of 1941 taxes, an agreement to pay 3% interest charge on accumulated deficiencies since December 1, 1940, etc., all of which was to remain partially executory for twenty years.

In principle, the situation before the court is not dissimilar from that which would exist if the state had made an agreement with the trustees to cancel part of the railroad's tax debt in consideration of an agreement by the railroad to carry all merchandise shipped by any state department or agency, or its municipalities, free of charge for a period of twenty years, and if the state later refused to execute the agreement as unconstitutional. Could it be contended that upon the filing by the state of a proof of claim for the taxes the bankruptcy court was vested with jurisdiction specifically to enforce such an agreement against the state without the consent of the state, merely because part of the consideration with which the contract dealt involved taxes?

We submit the transactions are distinct and separate, and the state cannot be compelled, without its consent, to submit to a suit to specifically enforce the Settlement Acts contract by mere reason of its filing the original proofs of claim.

(2)

The petition of the trustee seeks original relief of an affirmative nature and therefore cannot be interposed as a cross claim against the claim of the state.

It seems clearly established not only, as shown in the next preceding subpoint, that the cross claim must arise out of the same transaction as the state's claim in order for the maintenance of the latter to found jurisdiction for the entertainment by the court of the former without the state's consent, but also that if the cross claim seeks original and independent relief, the court is without jurisdiction to entertain it against the state without its consent. *Port Royal & A. Railway Co.* v. *South Carolina*, 60 F. 552, 553 (C. C. S. C., 1894); *Howard* v. *Cook*, 83 P. (2d) 209 (Id., Sup. Ct.). In the *Port Royal & A. Railway Co.* case cited above, the court said (60 F. at p. 553):

> "If this cross bill, on examination, be found to relate to any other matter than that contained in the original bill; if it seeks to inject new and foreign matter in the suit; if we find it abandons the proper office of defense, and seeks original and independent relief,—it is an improper cross bill, and is demurrable."

From the review of the Settlement Acts hereinabove, and of the posture of the proceedings at the time the trus-

tees filed their petition of August 12, 1944, setting forth their cross claim, there can be little question that the trustees do seek original and independent relief of an affirmative nature against the state.

It will be recalled that when that petition was filed there was in existence a decree of the New Jersey Court of Chancery (R. 77), subsequently affirmed by the New Jersey Court of Errors and Appeals, the state's highest tribunal, restraining and enjoining the state treasurer from "carrying out or executing any and all of the provisions of Chapter 290 of the Laws of 1941, and of Chapter 241 of the Laws of 1942, and from accepting from any railroad taxpayer any acceptance documents, discharges, or dismissals, discontinuances, checks or other forms of payment which may be delivered to him, * * *, or which were heretofore delivered to him, * * *, in purported compliance with Chapter 290 of the Laws of 1941 and Chapter 241 of the Laws of 1942, and from depositing any such checks or other forms of payment, or distributing the proceeds thereof."

This injunction continues in full force and effect to date. The state treasurer is the only official authorized by the Settlement Acts to execute and consummate the Settlement Act contract on behalf of the state. He has steadfastly declined to do so in obedience to the mandate of the courts of the State of New Jersey. The request of the trustees that the bankruptcy court adjudicate, with binding effect against the state, whether they entered into a contract with the state and whether such contract is binding on the state (R. 62, 63), is plainly a request that the court enter a decree which would, in effect, specifically enforce the contract with

the state. No official of the State of New Jersey is at liberty to effectuate an acquittance of the railroad of its tax or interest obligation, notwithstanding what the bankruptcy court, or any other court other than the New Jersey Court of Chancery or the New Jersey Court of Errors and Appeals, might determine. Only those tribunals can lift or modify the presently pending restraint against the enforcement or consummation of the Settlement Act. So far as the government of New Jersey is concerned, it continues to be the duty of the proper officials of the state to effectuate collection of the full amount of taxes and interest owing by the railroad to the state, anything contained in the Settlement Acts to the contrary notwithstanding.

Although we are not here debating the question as to the power of the federal bankruptcy court to compel the State of New Jersey and its agents to abide by any decree which it might make with respect to the amounts of money owing by the railroad to the state for taxes and interest, we emphasize that the enforcement of such a decree, conflicting with the existing decree of the New Jersey Courts invalidating the Settlement Acts contract, would constitute the exertion of affirmative action and power against the state, through action upon its responsible officials, and that a suit having that object may not be maintained against the state without its consent under the rule hereinabove set forth.

That the cross claim necessarily encompasses affirmative relief is more clearly seen when the executory nature of the Settlement Acts contract is taken into account. The so-called contract was not self-executing, under the terms of the statute. Assuming that the tender by the trustees of

the settlement documents called for by the Settlement Acts was in the nature of an acceptance of a contractual offer by the state, and that such offer was in compliance with the statute (which is not conceded), there did not result, under the Settlement Acts, an accord and satisfaction of the existing tax claims of the state against the railroad. This is for the reason that the accord was not executed. It was not executed for two reasons: First, the acceptance of the tenders by the only state official authorized by statute so to do, the state treasurer, was enjoined by the New Jersey Court of Chancery and that injunction later was affirmed by the New Jersey Court of Errors and Appeals. Second, the transaction was of a nature such that it was not contemplated to be fully executed until some undetermined future date, possibly twenty years subsequent to the entry into the compromise agreement. This is for the reason, hereinabove noted, that part of the consideration flowing from the railroad was its undertaking to pay the principal taxes assessed, together with 3% interest thereon from December 1, 1940, in installments over a period of time which, in the case of the Central, might be twenty years. Under the act, P. L. 1942, Ch. 241, Sec. 7, the entire original obligation for taxes and interest was to be revived upon any default in the payment of an installment of principal for a period of thirty days.

To constitute a bar, an accord must be executed, not merely executory. *Stone* v. *Todd*, 49 N. J. L. 274, 281 (Sup. Ct., 1887); 8 Atl. 300. In 1 Am. Jur. 252, Sec. 65, the rule is stated as follows

> "In order that a demand or cause of action may be barred by an accord, the general rule is that the accord must be executed. *Why the payment is not*

actually made or the accord executed is apparently immaterial. The promise is to satisfy, and until the promise is fulfilled the agreement is not binding, and since it is not a bar to an action on the original debt, it follows that is of no consequence as a bar to the original claim, whether the failure to perform may be attributed to the fault of either or neither party."

An unconditional acceptance by the creditor is necessary to establish an accord and satisfaction. 1 *Am. Jur.* 224, Sec. 23. The trustee may seek to urge, in opposition to the contention we here make, that the railroad has recently made a payment to the state which is large enough to discharge its entire remaining obligation for principal taxes and that therefore the Settlement Acts contract is no longer executory. Any such contention would fail, however, for at least two reasons.

It is true that on May 6, 1946, the railroad made payment to the state of $15,250,000 (R. 318), under and pursuant to Order No. 333 of the District Court (R. 296). But under the terms of the said order, which was consented to by the state, the state has studiously avoided any implication that the state officials were agreeing to accept the said sum under and pursuant to the Settlement Acts. The order is free from any reference to the Settlement Acts. Any interpretation of the order as calling for an acceptance of the said payment by the state officials under those acts is impossible, since the injunction made by the New Jersey courts against the acceptance of any moneys or documents under and pursuant to the Settlement Acts continues in full force and effect, and no New Jersey state official will knowingly violate it.

In the second place, the New Jersey Supreme Court has, on application of the Attorney General in another case, recently decided that where a railroad taxpayer owes principal and interest, the state officials may not accept and appropriate exclusively to principal a payment on account made by the railroad. *State* v. *Erie Railroad Company*, 23 N. J. Misc. 203 (Sup. Ct., 1945); 42 Atl. (2d) 759. The official position of the state, therefore, is that the said $15,250,000 paid by the railroad to the state in May, 1946, must be applied ratably to principal and interest, pursuant to the said rule of *State* v. *Erie Railroad Company*, and accordingly a substantial amount of principal taxes, as well as interest, remains due and owing to the state of New Jersey. The Settlement Acts contract (putting to one side the fundamental question as to its constitutionality and applicability to the trustees) continues to be executory.

For all of the reasons stated, the enforcement of the cross claim of the trustees against the state necessarily involves the entertainment by the court of bankruptcy of a suit involving independent relief of an affirmative nature against the state without its consent, and, therefore, offends the rule that a court of the United States has no jurisdiction to entertain a suit against a state without its consent.

(3)

No court possesses jurisdiction to entertain a claim of set-off against a tax obligation.

The third basis for rejecting jurisdiction of the court to entertain the cross claim of the trustees, growing out of the nature of the claim and cross claim, is that the cross

claim is set off against a tax claim, a device which has universally been held impermissible. *City of Camden* v. *Allen*, 26 N. J. L. 398 (Sup. Ct., 1857); *Enterprise* v. *Rowls*, 204 Ala. 528, 529, 86 So. 374; *Finnegan* v. *Fernandina*, 15 Fla. 379; *Tarner* v. *Dolton*, 134 Ga. 462, 67 S. E. 929; *Somerset* v. *Somerset Banking Co.*, 109 Ky. 549, 556, 60 S. W. 5; *Charlotte* v. *Kean*, 207 N. Y. 346, 100 N. E. 1116; *Gatling* v. *Cateret County*, 92 N. C. 536; *Milo* v. *Milo Water Co.*, 131 Me. 372, 163 Atl. 163; *Apperson* v. *City of Memphis* (C. C. W. D. Tenn., 1879), 2 Flipp. 363, Case No. 497, 1 Fed. Cas. 1068.

It is not an adequate response to our contention that the subject matter of the cross claim is, in part, related to the tax obligation. That very situation was presented in both *Milo* v. *Milo Water Co.* and *Apperson* v. *City of Memphis*, both *supra*.

In the *Milo* case, an action in debt by a town for an unpaid tax assessment owing by a water company, the latter sought to off-set the alleged liability of the town for water under a contract by which the town had agreed to pay the water company for water supplied the town, in part, "such further sum each year as shall equal the amount of tax, if any, assessed against said company by said Town of Milo during said year." The cross claim was rejected, the court holding (131 Me. 372, at p. 380):

> "Lastly, it would seem that recoupment, counterclaim or set-off is not available to defendant. Recoupment as such relates to damages arising out of breach of the same contract or transaction as that sued on (citing cases). There is clearly no basis for recoupment as such in a suit for taxes.

> "And the rule, based on the ground of public policy, seems sound that no set-off or counterclaim is admissible against demands for taxes levied for local governmental purpose. * * *"

Similarly, in the *Apperson* case, *supra*, the court held that it was powerless to permit as an off-set against a liability for a general city tax, a claim against the city on scrip issued to indemnify taxpayers who had previously voluntarily paid an illegal tax.

To recapitulate, the bankruptcy court had no jurisdiction to entertain the cross claim based upon the Settlement Acts contract against the State of New Jersey without its consent, because:

1. The Settlement Acts transaction was a different transaction than the tax assessment transaction.

2. The cross claim seeks the independent and affirmative remedy of specific performance of an executory contract against the state.

3. The cross claim is in the nature of a set-off or recoupment against taxes.

II.

If the Bankruptcy Court has jurisdiction to entertain the cross claim of the Trustee, the matter of the constitutionality of the Settlement Acts and their applicability to the Trustee should be referred to the New Jersey courts for determination in the interests of "the appropriate relationship between Federal and State authorities functioning as a harmonious whole."

We have heretofore pointed out that there is pending before the United States Third Circuit Court of Appeals, but not yet argued, an appeal by the Attorney General from the denial by the bankruptcy court of an application to grant the Attorney General leave to join the trustees as parties defendants in a declaratory judgment proceeding in the courts of New Jersey for the purpose of securing a final and specific adjudication of the question now raised by the trustees as to constitutionality and applicability, *as to The Central Railroad Company of New Jersey*, of the Settlement Acts.

In our introductory remarks hereinabove we requested that, should this Court determine that the bankruptcy court possesses jurisdiction to determine the existence of the Settlement Acts contract, and to enforce compliance therewith by the state, notwithstanding the legal argument to the contrary in the brief of the Attorney General and hereinabove in this brief, the Court should, nevertheless, direct that the bankruptcy court, in the exercise of appropriate discretion, refer the issue thus arising under the laws and constitution of New Jersey to the courts of New Jersey.

For purposes of the present Point, we concede that the trustee's attempt to establish that, as to him and the debtor, a constitutional and valid contract has arisen out of the Settlement Acts, notwithstanding the decision in *Wilentz* v. *Hendrickson, supra,* represents a justiciable controversy. The pertinent issue, however, is whether, under all of the circumstances here obtaining, that inquiry should be embarked upon by the bankruptcy court, or whether, in the appropriate exercise of discretion, the court should not call to its aid and assistance the New Jersey courts which must, in the final analysis, have the ultimate say with respect to the meaning and effect of the laws and Constitution of the State of New Jersey.

We submit that the recent decisions of the United States Supreme Court in comparable situations have left no room for debate but that the latter is the appropriate and practically mandatory course to pursue. *Spector Motor Service* v. *McLaughlin,* 323 U. S. 101; *Chicago* v. *Fieldcrest Dairies,* 316 U. S. 168; *Railroad Commission of Texas* v. *Pullman Co.,* 312 U. S. 496; *Thompson* v. *Magnolia Petroleum Co.,* 309 U. S. 478; and see *Meredith* v. *Winter Haven,* 320 U. S. 228; *Burford* v. *Sun Oil Co.,* 319 U. S. 315; *Watson* v. *Buck,* 313 U. S. 387, 401; *Great Lakes Dredge & Dock Co.* v. *Huffman,* 319 U. S. 293, 298; *Matthews* v. *Rodgers,* 284 U. S. 525, 526; *Arkansas Corporation Commission* v. *Thompson,* 313 U. S. 132, 145; and see *Alabama State Federation of Labor* v. *McAdory,* 325 U. S. 450.

In *Spector Motor Service* v. *McLaughlin, supra,* more fully discussed in Point III of this brief, the United States Supreme Court cited (323 U. S. 105) with approval the decision in *In re Central R. Co. of N. J.,* 136 F. (2d) 633

(C. C. A. 3rd, 1943), as one authority, among others, for the proposition that "federal courts do not decide questions of constitutionality on the basis of preliminary guesses regarding local law." It will be recalled that in the *Central Railroad* case *supra*, cited by the United States Supreme Court, the Third Circuit Court of Appeals found that it was improper for the bankruptcy court below to have made a determination of the tax claims of the State of New Jersey on the basis of the Settlement Acts at a time when the question as to the constitutionality of such acts was actually pending, undetermined, in the New Jersey Court of Chancery (136 F. (2d) at p. 638).

How much more impelling is the situation now obtaining, when the then awaited Chancery decision has since been rendered and affirmed by the New Jersey Court of Errors and Appeals, both holding flatly that the Settlement Acts violate Article I, Paragraph 20, of the State Constitution. If the ruling of the Third Circuit Court of Appeals in the prior *Central Railroad* case was sound, and even the trustee will hesitate to dispute that, in view of the express approval thereof by the United States Supreme Court in the *Spector* case, *supra*, then, *a fortiori*, the justiciable question now raised by the trustee as to whether the Settlement Acts are specifically valid as to the debtor on the basis of such showing of facts as he wishes to make, should be referred to the state courts, as the Attorney General proposes.

The quoted portion of the heading of this point is taken from the recent decision of the Supreme Court in *Chicago v. Fieldcrest Dairies, supra.* We submit that the situation there was almost a perfect parallel with that here obtaining.

In that case an action was brought in a federal district court for a declaratory judgment as to the construction and validity of a municipal ordinance of Chicago which required that milk sold in quantities of less than one gallon "should be delivered in standard milk bottles." The city declined to permit the respondent to sell milk in paper containers, whereupon the latter brought the action referred to, alleging that its containers were within the ordinance, and, if not, that the ordinance violated the state and federal constitutions. Issue was joined and the matter referred to a master in May, 1939. In July, 1939, the state law was passed regulating the use of paper milk containers and permitting municipal regulations of distribution of milk, if not in contravention of the law. On April 27, 1940, the master reported that the respondent's containers were not in compliance with the ordinance and that the ordinance was valid. The district court, on exceptions, held the containers were "standard milk bottles" and that under the state law the city could not prohibit their use. On appeal the Circuit Court of Appeals held the containers were not "standard milk bottles," but that the ordinance violated the state law and would be unconstitutional if it did prohibit the use of such containers.

On May 15, 1940, while the case was pending before the district court, the Dean Milk Company, of which respondent was a subsidiary, instituted a state court action against the city raising the same question involved in the federal proceedings. After judgment was entered by the federal district court, and pending the appeal, the Dean Milk Company moved in the state court for a decree in its favor and such decree was entered in December, 1940, the court re-

taining jurisdiction pending final determination of the appeal in the federal court.

On certiorari, the United States Supreme Court said (316 U. S. at p. 171):

> "We granted the petition for certiorari * * * because *of the doubtful propriety of the District Court and of the Circuit Court of Appeals in undertaking to decide such an important question of Illinois law instead of remitting the parties to the state courts* for litigation of the state questions involved in the case. *Railroad Commission* v. *Pullman Co.*, 312 U. S. 496."

The court then went on to make the following significant disposition of the matter (316 U. S. at pp. 172, 173):

> "We are of the opinion that the procedure which we followed in the *Pullman* case should be followed here. Illinois has the final say as to the meaning of the ordinance in question. It also has the final word on the alleged conflict between the ordinance and the state Act. *The determination which the District Court, the Circuit Court of Appeals or we might make could not be anything more than a forecast—a prediction as to the ultimate decision of the Supreme Court of Illinois.* Here, as in the *Pullman* case 'a federal court of equity is asked to decide an issue by making a tentative answer which may be displaced tomorrow by a state adjudication.' 312 U. S. at page 500, 61 S. Ct. at page 645, 85 L. Ed. 971. Furthermore, the dispute in its broad reach involves a question as to whether a city has trespassed on the domain of a State. Though that issue was not in the case when the complaint was filed, it emerged, due to the passage of the Milk Pasteurization Plant Law, long before the District Court entered its decree. *The*

delicacy of that issue and an appropriate regard 'for the rightful independence of state governments' (Beal *v.* Missouri Pacific R. Co., 312 U. S. 45, 50, 61 S. Ct. 418, 421, 85 L. Ed. 577) re-emphasize that it is a wise and permissible policy for the federal chancellor to stay his hand in absence of an authoritative and controlling determination by the state tribunals. As we said in the *Pullman* case, 'The resources of equity are equal to an adjustment that will avoid the waste of a tentative decision' and any 'needless friction with state policies.' See page 500 of 312 U. S., page 645 of 61 S. Ct., 85 L. Ed. 971, and cases cited; *Thompson* v. *Magnolia Petroleum Co.*, 309 U. S. 478, 483, 484, 60 S. Ct. 628, 630, 631, 84 L. Ed. 876. It is an exercise of a 'sound discretion, which guides the determination of courts of equity.' *Beal* v. *Missouri Pacific R. Co., Supra,* 312 U. S. at page 50, 61 S. Ct. at page 421, 85 L. Ed. 577. In this case that discretion calls for a remission of the parties to the state court which alone can give a definite answer to the major questions posed. *Plainly they constitute the more appropriate forum for the trial of those issues.* See 54 Harv. L. Rev. 1379."

It had been argued before the court that in view of the length of time that the matter had been pending (the litigation commenced shortly after the adoption of the ordinance on January 4, 1935, and the opinion of the United States Supreme Court was delivered on April 27, 1942), and the cost and inconvenience which had already been entailed, the federal courts should proceed to determine the questions of state law. To this the court responded (316 U. S. at p. 173):

"Considerations of delay, inconvenience, and cost to the parties which have been urged upon us, do not

call for a different result. For we are here concerned with *the much larger issue as to the appropriate relationship between federal and state authorities functioning as a harmonious whole.*"

In the *Railroad Commission* v. *Pullman Co.* case, referred to in the foregoing excerpt, the Supreme Court said (312 U. S. at pp. 500, 501):

> "Few public interests have a higher claim upon the discretion of a federal chancellor than the avoidance of needless friction with the state policies * * *. (Citing cases.) These cases reflect a doctrine of abstention appropriate to our federal system whereby the federal courts 'exercising a wise discretion,' restrain their authority because of a '*scrupulous regard for the rightful independence of the state governments*' and for the smooth working of the federal judiciary. See *Cavanaugh* v. *Looney*, 248 U. S. 453, 457; *Di Giovanni* v. *Camden Fire Ins. Asso.*, 296 U. S. 64. This use of equitable powers is a contribution of the courts in *furthering the harmonious relation between state and federal authority* without the need of rigorous congressional restriction of those powers."

The decision in the *Chicago* v. *Fieldcrest Dairies* case, *supra*, is apposite here. If the issue as to the conflict between the Chicago ordinance and the Illinois statute was one of "delicacy," how much more delicate is that as to the constitutionality of a New Jersey statute seeking to forgive obligations to the state of millions of dollars, in alleged violation of a basic fiscal provision of the state constitution.

If the Supreme Court was justified in the *City of Chicago* case in declining to permit federal decision of an issue "by making a tentative answer" as to the state law, and if "the appropriate relationship between federal and state authorities functioning as a harmonious whole" required the disposition there made, consider the shocking disruption of that relationship which may very well eventuate from the course upon which the bankruptcy court has here embarked. Should that court, after hearing the issue, determine that the Settlement Acts are constitutional as to the debtor and that a valid contract exists as between the trustees and the state, and accordingly adjudicate the state's claim on the basis of the Settlement Acts, it would be utterly impossible for the state to avail itself of that decision in view of the final injunction filed in the New Jersey courts preventing the State Treasurer from accepting any principal tax moneys under and pursuant to the Settlement Acts. Not only under the Settlement Acts, but under the laws of the state governing the duties and obligations of the State Treasurer generally, R. S. 52:18-1, *et seq.*, he is the only officer who can accept and transmit moneys into the State Treasury. He is, moreover, a constitutional officer (N. J. Const., Art. VII, Sec. 2, Par. 2).

The sad spectacle of the conflict between federal and state authority which would result from such a determination by the federal court cannot be justified on the basis of any theoretical discussion by the trustees as to the supposed conclusiveness against the state of such a federal adjudication. Apart from the serious legal doubts attending such a conclusion, there would remain in any event a most regrettable disruption of the "appropriate relation-

ship between federal and state authorities functioning as a harmonious whole."

In the *City of Chicago* case, as here, a state court determination intervened pending the federal proceedings. If the trustees correctly contend that the New Jersey decree does not conclude them, neither did the Illinois decree conclude the respondent in the *City of Chicago* case. The litigant affected by the Illinois state case was, moreover, not the same litigant as was prosecuting the federal proceedings, but only a related corporation. Compare the trustees' present claim as to the non-conclusiveness of the New Jersey litigation as to them. There can be no reasonable dispute that the procedure suggested by the Attorney General and by the City of Jersey City would lead to a consideration by the New Jersey courts of the specific contentions made by the trustees, with the result that a determination by those courts in favor of the trustees would permit such opening or modification of the state court injunction as would make possible an effectuation of the determination without any conflict between state and federal jurisdictions. (See Point IV hereinafter.)

That we are here confronted with a railroad reorganization under Section 77 does not affect the basic principle. The same disposition of a similar problem was made by the United States Supreme Court in a Section 77 railroad reorganization case. *Thompson* v. *Magnolia Petroleum* case, *supra*, (cited in the *City of Chicago* case). There the trustees of the railroad petitioned the bankruptcy court to adjudicate the title of the trustees to certain lands whereon its right of way ran, so that they might have the benefit of newly discovered oil fields under the surface. The respond-

ent in that case denied the trustee's title and claimed a prior right under leases from adverse claimants. The district court took jurisdiction and made an order impounding the oil pending its ultimate determination of the question of title. The Circuit Court of Appeals reversed on the ground that under Illinois law the trustees had only an easement and that the bankruptcy court had no summary jurisdiction to determine fee title. The Supreme Court reversed, holding that possession of the land was sufficient to give the bankruptcy court summary jurisdiction to determine title, but that, *as a matter of discretion,* the question of title should be submitted to the Illinois courts. The court said at pp. 483-484:

> "A court of bankruptcy has an exclusive and nondelegable control over the administration of an estate in its possession. But the proper exercise of that control may, where the interests of the estate and the parties will best be served lead the bankruptcy court to consent to submission to state courts of particular controversies involving unsettled questions of state property law and arising in the course of bankruptcy administration. And, under the circumstances of this case, we conclude that it is desirable to have the litigation proceed in the state courts of Illinois. * * *
>
> "Decision with which the Federal Court of bankruptcy is here faced calls for interpretation of instruments of conveyance in accordance with Illinois law. Neither statutes nor decisions of Illinois have been pointed to which are clearly applicable. *And the difficulties of determining just what should be the decision under the law of that state are persuasively indicated by the different results reached by the two Circuit Courts of Appeal that have attempted the determination.* Unless the matter is referred to the

State Courts, upon subsequent decision by the Supreme Court of Illinois it may appear that rights in local property of parties to this proceeding have —by the accident of federal jurisdiction—been determined contrary to *the law of the State which in such matters is supreme.*

"* * * The cause is remanded to the District Court with instructions to modify its order so as to provide appropriate submission of the question of fee simple ownership of the right of way to the Illinois State Courts."

The rationale of the holding quoted is applicable here. The interests not only of the State of New Jersey, but of the debtor, trustee and intervening bondholders, can best be served by the requested reference to the New Jersey courts. A decision there in favor of the position of the trustee would conclusively settle the tax claims of the State of New Jersey in these proceedings, since the requested reference would determine not only the constitutionality of the Settlement Acts as to the debtor (assuming, but not conceding that that question has not already been determined), but also the sufficiency of the tenders by the trustees under the Settlement Acts, and thus terminate the controversy. If, on the other hand, the application of the Attorney General for reference of the question to the state courts is denied and the matter goes forward in the bankruptcy court, there may be one disposition of the questions under the Settlement Acts by the special master, another by the bankruptcy court itself, a rejection of one or the other by the Circuit Court on appeal, and, possibly, another "forecast", "prediction", or "tentative answer" (*City of Chicago* v. *Fieldcrest Dairies, supra,* 316 U. S. at p. 172), by the United States Supreme Court.

Thus, in the event of a conclusion, either by the master or the District Court, in favor of the position of the trustee, and the not unlikely disagreement therein, either by the Circuit Court or this Court, all of the time, effort, and expense to which not only the estate of the debtor, but also the State of New Jersey and the intervening bondholders, would have been put, would be wasted, and the universally desired termination of these reorganization proceedings have been avoidably delayed.

We reserve for discussion in Point III herein the yet additional contingency which might possibly arise to further complicate the proceedings—that somewhere in the train of the federal litigation a "forecast" or "guess" might be made that the Settlement Acts are unavailable to the trustees, thereby necessitating hearings on the alternative contentions made by the trustees respecting the asserted federal constitutional and other objections to the taxes and interest charges.

In *Ford Motor Co.* v. *Department of Treasury of Indiana*, 323 U. S. 459, it was stated at page 470:

> "The advantage of having state courts pass initially upon questions which involve the state's liability for tax refunds is illustrated by the instant case where petitioner sued in a federal court for a refund only to urge on certiorari that the federal court erred in its interpretation of the state law applicable to the questions raised."

See also the reference to "our historic national policy of federal non-interference with the taxing power of states," in *Arkansas Corporation Commission* v. *Thompson*, 313 U. S. 132, 145. Cf. the emphasis upon abstention of

exercise of federal equity jurisdiction where the "collection of state taxes or the fiscal affairs of the state" are involved. *Meredith* v. *Winter Haven, supra* (320 U. S. 228, 235); *Matthews* v. *Rodgers, supra; Great Lakes Dredge & Dock Co.* v. *Huffman, supra; Stratton* v. *St. Louis S. W. R. Co.*, 284 U. S. 521.

The reliance by the trustee upon *Meredith* v. *Winter Haven, supra,* is ineffectual. That case held only that where the jurisdiction of a federal district court was invoked on grounds of diversity of citizenship, it could not decline to exercise its jurisdiction to determine questions of state law merely because they were difficult or uncertain. The court was at pains to cite the cases upon which we have relied hereinabove and many others as representing well defined and recognized situations in which, for reasons of public policy, a federal court will decline to exercise its jurisdiction to pass upon a question of state law. No such public policy was asserted or found to exist in the *Winter Haven* case.

The case of *Public Utility Commission of Ohio* v. *United Fuel Gas Co.*, 317 U. S. 456, also relied upon by the trustee, is not in point. There the court declined to refer a question of state law to the state courts on the ground, *inter alia,* (p. 463) that "no state court ruling of local law could settle the federal questions that necessarily remain." Here, on the contrary, as we have shown above, a state court determination as to the constitutionality and availability of the Settlement Acts to the trustee can, if favorable to the trustee, completely settle the issue as to the New Jersey tax claims. As we shall show in Point III, moreover, such a result would eliminate several questions of *federal*

constitutional law from the controversy. That the disposition of the state tax claims will not dispose of the entire reorganization is, of course, irrelevant, the same situation having obtained in the railroad reorganization case of *Thompson* v. *Magnolia Petroleum Co., supra,* where the court referred one issue arising in the Section 77 reorganization, over which the bankruptcy court had conceded jurisdiction, to the state court for determination.

III.

A reference of the questions of state law to the state courts would eliminate the necessity of deciding federal constitutional qustions on the basis of "preliminary guesses regarding local law."

It is now thoroughly settled that where the determination of a question of constitutional law depends upon the preliminary determination by a federal court of a disputed question of local law, the latter issue will be referred to the state courts to obtain the benefit of an authoritative determination of the local law and thereby possibly eliminate the necessity of deciding the federal constitutional question. *Spector Motor Service* v. *McLaughlin, supra; Chicago* v. *Fieldcrest, supra; Railroad Commission* v. *Pullman Co., supra.* And see *Meredith* v. *Winter Haven, supra* (320 U. S. at 235).

That situation is squarely presented here. The trustee contends before the district court that if the applicability of the Settlement Acts is determined adversely to his position, the New Jersey taxes are objectionable as in vio-

lation of the due process and equal protection clauses of the 14th Amendment (R. 84, par. 5, 73, 74), and the Interstate Commerce and Bankruptcy clauses of Article I, Section 8 of the Federal Constitution (R. 74, 75). It is also claimed, in such event, that there would be an unconstitutional impairment by the state of a valid contract between it and the trustees (R. 60, par. 60). *None of these constitutional questions would require determination in the event that the New Jersey courts, on the requested reference, determine that the Settlement Acts are valid as to the trustees and that a valid contract has arisen settling the amount of the tax claim against the debtor.* The making of that determination involves decision of matters of New Jersey law in the following respects:

1. Whether the determination of the New Jersey Court of Errors and Appeals in *Wilentz* v. *Hendrickson, supra,* that the Settlement Acts offend the New Jersey Constitution, is specifically sound as to the alleged contract between the state and the trustees of the Central Railroad Company of New Jersey, notwithstanding the contentions to the contrary advanced by the trustee in the bankruptcy court (R. 43, *et seq.*).

2. Whether, assuming a valid and constitutional offer was made by the state in the Settlement Acts, the trustees of the railroad strictly complied therewith by agreeing, as required in the Settlement Acts, to pay the full amount of the principal taxes assessed for the years 1932-1940, inclusive. P. L. 1942, Ch. 241, Sec. 2. This issue arises because the amount the railroad agreed to pay is less than what the Attorney General now claims as the principal tax balances due for the years in question, a difference which

stems from conflicting views as to the law of New Jersey in respect of the proper method of appropriating payments on account of arrears of taxes between principal of taxes and accrued interest thereon. The trustee contends that its principal tax obligation due at the time of the adoption of the Settlement Acts, for the years 1932 to 1939, inclusive, was $12,117,383.92 (R. 84, par. 2). The contention of the Attorney General is that the principal tax balance for those years was $14,140,887.53 (R. 94). For the latest expression with respect to the law of New Jersey as to the proper method of appropriating partial payments on account, to railroad taxes and interest in arrears, see *State* v. *Erie Railroad Company*, 23 N. J. Misc. 203, 42 Atl. (2d) 759. This question was adverted to, but found unnecessary to decide in *Wilentz* v. *Hendrickson, supra,* (135 N. J. Eq. at p. 247).

In the *Spector Motor Service* case, *supra,* an action was brought in a federal district court to enjoin the enforcement of a state tax as allegedly violative of the Interstate Commerce clause. The district court construed the statute as not intended to apply to interstate commerce and, therefore, not applicable to the petitioner, which did only interstate business. The Circuit Court of Appeals construed the statute as applicable to petitioner and held that, as so construed, it violated neither the Connecticut nor the federal Constitutions. On certiorari the United States Supreme Court stated that the federal constitution issues did not "emerge until all other local Connecticut issues are decided against the petitioner" (323 U. S. at p. 104). The court went on to conclude that since the State of Connecticut made available an action for declaratory judgment for the determination of the issues of Connecticut law involved,

the cause should be remanded to the district court with directions to retain the appeal, "pending the determination of proceedings to be brought with reasonable promptitude in the state court" (323 U. S. 106). It is noteworthy that this disposition was made by the court on its own initiative, *without any application therefor by the parties.* The language of the court is so perfectly dispositive of the issue involved here that we quote the court's reasoning at length (pp. 104-105):

> "* * * it is for Connecticut to decide from what aspect of interstate business she seeks an exaction. It is for her to say what is the subject matter which she sought to tax and what is the calculus of the tax she seeks. *Every one of these questions must be answered before we reach the constitutional issues which divided the court below.*
>
> "Answers to all these questions must precede consideration of the Commerce Clause. To none have we an authoritative answer. Nor can we give one. *Only the Supreme Court of Errors of Connecticut can give such an answer.* But this tax has not yet been considered or construed by the Connecticut courts. We have no authoritative pronouncements to guide us as to its nature and application. That the answers are not obvious is evidenced by the different conclusions as to the scope of the statute reached by the two lower courts. The Connecticut Supreme Court may disagree with the District Court and agree with the Circuit Court of Appeals as to the applicability of the statute. But this is an assumption and at best 'a forecast rather than a determination.' *Railroad Commission* v. *Pullman Co.*, 312 U. S. 496, 499, 85 L. Ed. 971, 974, 61 S. Ct. 643. *Equally are we without power to pass definitely on the other claims urged under Articles 1 and 2 of the Connecticut Constitu-*

tion. If any should prevail, our constitutional issues would either fall or, in any event, may be formulated in an authoritative way very different from any speculative construction of how the Connecticut courts would view this law and its application. *Watson* v. *Buck,* 313 U. S. 387, 401, 402, 85 L. Ed. 1416, 1423, 1424, 61 S. Ct. 962, 136 A. L. R. 1426.

"If there is one doctrine more deeply rooted than any other in the process of constitutional adjudication, it is that we ought not to pass on questions of constitutionality—here the distribution of the taxing power as between the State and the Nation—unless such adjudication is unavoidable. And so, as questions of federal constitutional power have become more and more intertwined with preliminary doubts about local law, *we have insisted that federal courts do not decide questions of constitutionality on the basis of preliminary guesses regarding local law. Railroad Commission* v. *Pullman Co.,* 312 U. S. 496, 85 L. Ed. 971, 61 S. Ct. 643, *supra; Chicago* v. *Fieldcrest Dairies,* 316 U. S. 168, 86 L. Ed. 1355, 62 S. Ct. 986; *Re Central R. Co.,* (C. C. A. 3d) 136 F. (2d) 633, 54 Am. Bankr. Rep. (N. S.) 101. See also *Burford* v. *Sun Oil Co.,* 319 U. S. 315, 87 L. Ed. 1424, 63 S. Ct. 1098; *Meredith* v. *Winter Haven,* 320 U. S. 228, 235, 88 L. Ed. 9, 13, 64 S. Ct. 7; *Green* v. *Phillips Petroleum Co.,* (C. C. A. 8th) 119 F. (2d) 466; *Findley* v. *Odland,* (C. C. A. 6th) 127 F. (2d) 948; *United States* v. *150.29 Acres of Land More or Less,* (C. C. A. 7th) 135 F. (2d) 878. Avoidance of such guesswork, by holding the litigation in the federal courts until definite determinations on local law are made by the state courts, merely heeds this time-honored canon of constitutional adjudication.

"We think this procedure should be followed in this case."

In *Chicago* v. *Fieldcrest Dairies, supra,* discussed at length in Point II, as an additional ground for the determination of the court that the issues of Illinois law should be referred to the Illinois courts, the court said (316 U. S. at p. 173):

> "It is of course true that respondent sought to raise in its complaint a constitutional issue—an issue which lurks in the case even though it not be deemed substantial. But here, as in the *Pullman Co.* case, *that issue may not survive the litigation in the state courts.* If it does not, the litigation is at an end. That again indicates the wisdom of allowing the local law issues first to be resolved by those who have the final say. *Avoidance of constitutional adjudications where not absolutely necessary* is part of the wisdom of the doctrine of the *Pullman Co.* case."

In *Railroad Commission of Texas* v. *Pullman Co., supra,* cited in the foregoing cases there was before the Supreme Court on appeal a federal district court determination that an order by the Railroad Commission of Texas was violative of Texas statute and subject to injunction because in conflict with the equal protection and due process clauses of the 14th Amendment and the commerce clause of the Federal Constitution. The United States Supreme Court reversed the judgment, saying (312 U. S. at p. 499)

> "Reading the Texas statutes and the Texas decisions as outsiders without special competence in Texas law, we would have little confidence in our independent judgment regarding the applicability of that law to the present situation."

Then, conceding the competency in Texas law of the federal district court judges, the Supreme Court went on to say (pp. 499-500):

> "But no matter how seasoned the judgment of the district court may be, *it cannot escape being a forecast rather than a determination. The last word on the meaning of* • • • *the Texas Civil Statutes* • • • *belongs neither to us nor to the district court, but to the Supreme Court of Texas.* In this situation a federal court of equity is asked to decide an issue by making a tentative answer which may be displaced tomorrow by a state adjudication. *Glenn* v. *Field Packing Co.*, 290 U. S. 177; *See* v. *Bickell*, 292 U. S. 415. The reign of law is hardly promoted if an unnecessary ruling of a federal court is thus supplanted by a controlling decision of a state court. *The resources of equity are equal to an adjustment that will avoid the waste of a tentative decision as well as the friction of a premature constitutional adjudication.*"

And at page 501:

> "Regard for these important considerations of policy in the administration of federal equity jurisdiction is decisive here. *If there was no warrant in state law for the Commission's assumption of authority there is an end of the litigation; the constitutional issue does not arise.*"

So, too, here. If the state courts shall determine the issues arising out of the Settlement Acts favorably to the trustee, and accordingly lift the pending state court injunction, as only they can, so as to make possible the effectuation of the thus conclusively determined settlement of the

state tax claims, "there is an end of the litigation" and the alternative constitutional issues raised by the trustee here do not arise.

IV.

The Uniform Declaratory Judgments Act is law in New Jersey and makes available a determination of the issues sought to be referred to the state courts.

In the several United States Supreme Court decisions above referred to, where issues of state law were directed to be referred to the state courts, it was generally assumed that the state laws made available procedure for the determination of the questions. Certainly, the appropriate exercise of federal discretion, as contended for here, should not be declined unless it is plain that no procedure exists whereby the New Jersey courts could dispose of the questions presented. In *Spector Motor Service* v. *McLaughlin, supra,* however, the court pointed out the availability of an action for declaratory judgment under the Connecticut statutes. So, too, under the New Jersey law. New Jersey has adopted the *Uniform Declaratory Judgments Acts* (R. S. 2:26-66, *et. seq.*).

We respectfully submit that the situation here presented is such as represents the very type of controversy peculiarly adapted to the procedure under the uniform act, and for the handling of which the act was devised. It is inconceivable that the New Jersey courts would decline to entertain a proceeding brought under its terms in the New Jersey Court of Chancery by the Attorney General of the state,

reciting (a) the earlier proceedings in that court in *Wilentz v. Hendrickson, supra,* (b) the controversy raised by the trustee in these proceedings respecting the validity and applicability of the Settlement Acts as to him, and (c) a direction by this Court that the Attorney General be granted permission to join the trustee as a party defendant in such state court proceedings, entered for the purpose of obviating any possibility of a conflict between a federal court adjudication of the existence of a binding contract between the state and the trustee based upon the Settlement Acts and the permanent injunction against enforcement of the acts and acceptance of any moneys thereunder now filed in the Court of Chancery against the State Treasurer.

Although the New Jersey cases have held that the remedy of declaratory judgment is not available where there is another remedy for the specific injury complained of, the present situation plainly is one where no other remedy can meet the anticipated specific conflict between federal and state adjudications and decrees above referred to.

In *Empire Trust Co.* v. *Board of Commerce and Navigation,* 124 N. J. L. 406, 411, 11 Atl. (2d) 752, the New Jersey Supreme Court stated:

> "The Declaratory Judgments Act is designed to provide a remedy for the adjudication of justiciable rights, duties, status and other legal relations of the parties before rights have been invaded or wrongs committed. * * * The declaratory judgment was intended to modify the common law rule that there is no justiciable controversy until a right has been invaded."

Plainly, that reasoning applies here. The purpose of the Attorney General's application below and of our pres-

ent contention here is to secure such a determination of the rights and obligations of the trustee and the state under the Settlement Acts, if any, as will permit any such adjustment of the existing Chancery Court injunction against the State Treasurer as may be necessary to accord with the conclusion of the court on the merits of the controversy and protect all parties in interest in advance of the invasion of any right or the commission of any wrong. The action would be brought by the Attorney General, as successor in interest to the former Attorney General who was the informant in *Wilentz* v. *Hendrickson, supra.*

It is inconceivable that the state courts would, upon the foregoing showing, decline to exercise jurisdiction under the act to afford the declaratory and supplemental relief requested. There is a wealth of judicial authority for the submission by a state attorney general or similar officer of comparable issues for determination under a declaratory judgments statute. *State ex rel. Hopkins* v. *Grove,* 109 Kans. 619, 201 Pac. 82; *Jefferson County Fiscal Court* v. *Jefferson County, ex rel. Grauman, county attorney,* 278 Ky. 785, 129 S. W. 2d 554; also case of same name, 278 Ky. 68, 128 S. W. 2d 230; *Jones, Attorney General* v. *Vermont Asbestos Corp.,* 108 Vt. 79, 182 Atl. 291; *State, ex rel. Eubanks* v. *Board of Commissioners, et al.,* 150 Kans. 143, 91 P. 2d 2; *Attorney General* v. *Racecourse Betting Control Board* (1935), 1 Ch. 34; *Lynn* v. *Kearney County,* 121 Neb. 122, 236 N. W. 192; *Ward* v. *Klamath County,* 108 Ore. 574, 218 Pac. 927.

The use of the Declaratory Judgment procedure by administrative governmental agencies to settle both private and public rights, duties, and liabilities is universally rec-

ognized as a most characteristic and appropriate application of the practice. *Borchard, Declaratory Judgments* (2d ed. 1941), pages 155, 520, 875, 884, 885, 915, *et seq.*

If the trustee entertains any doubt, which we do not, as to the availability of a proceeding for the stated purpose under the Declaratory Judgments Act, there can be no question whatever that the New Jersey Court of Chancery would entertain a supplemental civil information filed by the Attorney General, either plenary in form, or addressed to the final decree in *Wilentz* v. *Hendrickson*, laying before the court the matters in question. The Attorney General has frequently expressed his willingness to cooperate with the trustee to the end that the procedure employed in the state courts shall be such as to expedite and assure a solution of the question presented, on its merits.

The offer of cooperation by the attorney general in devising the procedure for submission of the questions to the state courts insures that no procedural obstacle will arise to block this expeditious means of solution of the Settlement Act controversy.

Conclusion.

For the reasons hereinabove stated, it is respectfully submitted:

1. The judgment of the Circuit Court of Appeals should be affirmed for the reason that the bankruptcy court is without jurisdiction to entertain the claim of the trustee for specific performance of the Settlement Act contract against the State of New Jersey without its consent.

2. In the alternative, the Court should direct that the bankruptcy court submit to the courts of New Jersey for determination all questions as to the constitutionality and applicability as to the trustee of the Settlement Acts (P. L. 1941, Ch. 290 and P. L. 1942, Ch. 241).

Respectfully submitted,

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